

Proposed Decision of SB 1022 Appeals Hearing Panel to BSCC – Stanislaus County

Summary

The SB 1022 Appeals Hearing Panel recommends that the Board of State and Community Corrections grant the remedy requested on appeal by Stanislaus County. On a 2-1 vote at a hearing on March 11, 2014 the panel determined that Stanislaus County should have received credit for Preference Criterion #3 related to the California Environmental Quality Act (CEQA). With this preference point, Stanislaus County would receive four of the four available preference points and would move from being ranked seventh to second among the medium counties. If the BSCC proceeds with ranking the counties in the same manner as it ranked the small and large counties, San Joaquin County would then receive no funding, and Tulare County's recommended award would be reduced from \$40 million to \$33,352,000. Further information is set forth below.

Background

On February 28, 2014, the County of Stanislaus appealed the BSCC's decision for the SB 1022 Construction Financing program pursuant to BSCC Regulation 1788. The appeal was based on the county's contention that it should have received Preference Criterion #3, compliance with the California Environmental Quality Act and the expiration of all applicable statutes of limitations under that law. The county stated its appeal was based on "...BSCC's incorrect assumption that the County's documentation of CEQA was incomplete, thus denying the County certification that it had complied with Preference Criterion #3."

The Department of Finance provided the following analysis in response to the Stanislaus County appeal.

All submittals for SB 1022 funding were submitted to the BSCC by October 25, 2013. The Department of Finance reviewed all requests for Funding Preference Criterion #3 based on what was required in the Request for Proposal (RFP). Page 18 of the RFP states:

CEQA Compliance (optional criterion): Each proposal seeking to satisfy this criterion must include documentation evidencing that CEQA compliance has been completed, and provide written certification that all statutes of limitation have expired without challenge (emphasis added), or the challenge(s) has been fully resolved.

Two separate and duplicative copies of the CEQA documentation package must accompany the proposal submittal. The package shall include either the final Notice of Determination (NOD) or final Notice of Exemption (NOE) stamped as received by the entity with which it was filed for public review; the stamp must include the date received. Related back-up information and CEQA documents filed previous to the final NOD or NOE are not requested and should not accompany this submittal, but must be retained by the county. The submittal shall also include a written certification by county counsel that states the final NOD or NOE was filed, the entity with which it was filed, when it was filed, and further certifies that all related statutes of limitation have expired without challenge. If there was a challenge(s), the letter from county counsel must acknowledge the

challenge(s), including the nature of the challenge(s), and provide documentation evidencing the challenge(s) has been completely resolved in a manner that allows the project to move forward as proposed. If the filing was done with an entity other than the State Clearinghouse, the county must also provide the statute identifying the length of associated statutes of limitation period (duration).

The required Board of Supervisors' resolution language for this preference criterion shall also be provided with the proposal submittal. (See Board of Supervisors' Resolution section of the Proposal Form.)

Please see attached Exhibit 1 from county counsel John P. Doering certifying that a "...Notice of Exemption for the County's SB 1022 project was approved at the County's Board of Supervisors on October 15, 2013. The attached Notice of Exemption was filed with the State Clearinghouse on October 16, 2013 and all related statutes of limitation will expire on November 21, 2013."

Because the county's documentation, which was submitted as required, clearly states that the statute of limitations had NOT expired at the time of submittal of the request, the CEQA criterion was not awarded to Stanislaus County. Had Stanislaus County filed the NOE earlier, they would have been able to provide the required evidence "that CEQA compliance has been completed, and provide written certification that all statutes of limitation have expired without challenge (emphasis added), or the challenge(s) has been fully resolved."

On March 11, 2014 the appeals hearing panel convened to hear the appeal of Stanislaus County. The appeals hearing panel members were Judge William Pounders (Ret.) of Los Angeles, Sheriff Dean Growdon of Lassen County and Secretary Jeff Beard of the California Department of Corrections and Rehabilitation. Judge Pounders acted as the presiding officer for the proceedings.

Appearing at the appeals hearing on behalf of Stanislaus County were Patricia Hill Thomas, the county's Chief Operating Officer; Captain Bill Duncan, Stanislaus Sheriff's Department; retired Lieutenant Darrell Long, Stanislaus County Program Manager; and Joan Cox, the county's outside counsel. The county's representatives were provided with an opportunity to explain to the appeals hearing panel the nature of its project and the specific complaints the county had about the preference criterion not being awarded.

Statement of Decision

The appeals hearing panel and the county both acknowledge that there was a technical defect in the CEQA documentation provided by Stanislaus County, in that the Notice of Exemption (NOE) it filed with the proposal showed that the statute of limitations would expire at a future date, and therefore did not fully meet the requirement that all applicable statutes of limitations have expired without challenge. The panel takes note of the fact that the county filed the NOE out of an abundance of caution and takes particular note of the fact that the county admits that it

may have been guilty of being “too careful” in its review and attempted compliance with the RFP instructions.

On appeal the county demonstrated that it had prepared an Environmental Impact Report and filed a Notice of Determination (NOD) in July 2011. The county stated that it did not file the July 2011 NOD with its BSCC proposal because the RFP instructions stated:

Related back-up information and CEQA documents filed previous to the final NOD or NOE are not requested and should not accompany this submittal, but must be retained by the county.

The county did not file the earlier NOD based on its understanding that the instructions did not allow for it.

In response to the county’s argument, Karen Finn with the Department of Finance explained that the county’s proposal specifically stated that the applicable statute of limitations had not expired and would expire in the future. Ms. Finn confirmed that the county’s NOD from 2011 would have been sufficient to satisfy Preference Criterion #3.

In light of the fact that Preference Criterion #3 was not granted to Stanislaus County due to a technical defect and because the County’s Project is meritorious of funding, as evidenced by the ESC’s rating for the county’s project, the appeals hearing panel finds by a vote of 2-1 (Sheriff Growdon voting no) that Preference Criterion #3 should have been awarded to Stanislaus County. The appeals hearing panel thus sustains Stanislaus County’s appeal.

Recommendation

The appeals hearing panel recommends that the Board consider the recommendation of the appeals panel and adopt this proposed decision, which would move Stanislaus County to position number two in the medium-sized counties.